In the Supreme Court of the United States.

December Term, 1872.

The United States, *Intervenors, Plaintiffs in Error,* *vs.* John P. Tweed and Benjamin F. Flanders, *Deputy General Agent of the Treasury Department of the United States.*	No. 136.
Benjamin F. Flanders, *Deputy General Agent of the Treasury Department of the United States, Plaintiff in Error,* *vs.* John P. Tweed.	No. 628.

In Error to the Circuit Court of the United States for the District of Louisiana.

Brief for the Plaintiffs in Error.

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BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT.

The plaintiffs in error submit that the above case raises the following questions:

1. How far one, who became an agent of the United States to purchase cotton of a certain description at a specified time and place, can show that cotton purchased by him at such time and place, is not within the scope of his agency.

2. Whether property held by an agent under the act

of July 2, 1864, § 8, is liable to sequestration, *pendente lite*, in favor of an adverse claimant.

3. Whether the only remedy of the plaintiff below be not exclusively in the Court of Claims.

The following is an abstract of the *pleadings*, so far as is necessary to develope the above points:

The Petition of Tweed (Record, p. 1) states that he is the owner, and entitled to the possession, of 123 bales of cotton, which the defendant Flanders, deputy general agent of the United States Treasury Department, unjustly retains possession of, and refuses to deliver; that no part of such cotton is captured or abandoned property, nor has the United States any right, title, or interest in the same, or any part thereof; that it is worth $17,500; and that he fears Flanders will, pending the suit, dispose of and remove it from the jurisdiction of the court. It prays for a citation of Flanders, sequestration of the cotton until further orders, and that, after due proceedings, the cotton be redelivered, &c.

The Answer (p. 9) and amended answer, &c., (p. 16,) of Flanders, denies that Tweed owns the cotton, and asserts that it belongs to the United States; admits that he is in possession of the cotton as an officer of the United States, by virtue of a contract between Tweed and the Treasury Department, and admits that he has orders from that Department to ship it to New York; and claims that the cotton, being virtually in the custody of the United States, is not liable to sequestration, and that all his acts in reference to the cotton were official, and not private; that the court has no jurisdiction over the matters complained of, but that such jurisdiction is exclusively in the Court of Claims.

The *Claim* of the United States, filed May 8, 1866, (p. 10,) states that the cotton belongs to them as sole owners, and that Flanders, at the time of sequestration, was in possession merely as their agent.

The *Proof* is, that upon the 23d of January, 1866, the defendant Tweed entered into a contract in writing with one Burbridge, subject to the approval of the Secretary of the Treasury, in which, after reciting "that it is represented that large quantities of cotton, which formerly belonged to the late so-called Confederate States, are now in possession of individuals in the Red River country, concealed from the knowledge of agents appointed to collect the same, and the marks by which said former ownership could have been produced [proved] have been destroyed, for the purpose of enabling the individuals holding it to convert it to their own use; and whereas it is also represented that most of this cotton is held at places and in districts remote from military posts, so that, if it could be found and identified, it could not be brought forward by the agents, except by increasing the expense of obtaining military aid in its removal, and that the parties holding it dare not bring it within the reach of the civil or military authorities, for fear that its true character may be discovered, thereby causing its seizure; and whereas it is also represented that a large portion of this cotton can be purchased from the holders at much less than its real value, if the purchaser will take the title at his own risk of seizure by Government authorities," it was agreed that Tweed was to furnish all money necessary to buy said cotton, together with all necessary assistance for the purpose of transportation, and to "use all proper efforts to purchase as much of said cotton situated upon and near the Red river and its tributaries, as can be purchased, prepared for shipment, and transported to and delivered at New Orleans, at a cost not exceeding three fourths its market value there, and to deliver the same to said Burbridge, in New Orleans." And, thereupon, Burbridge agreed to deliver to Tweed three-fourths of such cotton in full of his interest therein.

On the 24th of February, 1866, the Secretary of the Treasury wrote, from Washington, D. C., a letter to W. P. Mellen, general agent of the Treasury Department at New Orleans, directing the termination of the contract between Burbridge and Tweed.

On the 10th of March, 1866, Burbridge was succeeded in his office of deputy agent, &c., by the defendant Flanders.

The cotton in question was part of a parcel of 495 bales raised in Texas, (p. 19,) purchased by Tweed from various owners at a fair market price, in and about Shreveport, Louisiana; and the bills of sale (pp. 24, &c.) show that 463 bales of it were bought on or before the 1st of March, 1866, and the rest upon the 5th and 8th of March.

The cotton reached New Orleans March 23, 1866, a part of it having been shipped from Shreveport (p. 26) on the 13th of the same month. Insurance on it was effected under an open policy of Burbridge, deputy agent, &c., and it came to New Orleans subject to *adjudication* by said Burbridge, &c., (p. 20.)

On its arrival, Flanders, as successor of Burbridge, claimed one-fourth of it, under the contract above stated, "because Tweed, having that contract, could make no purchase of cotton in which the Government did not take one-fourth part, although the purchase was not of cotton of the character referred to therein," (p. 20.) Tweed resisted this claim, and Flanders applied for instructions to the Treasury Department, and upon the same day a telegram from the Secretary of the Treasury (Mr. McCulloch) was sent, (p. 30,) ordering him to hold the cotton, without distribution, for further directions, and forward all the facts by mail. To the statement of "facts," thus made, (apparently,) he received a letter from McCulloch, dated April 2, 1866, (p. 29,) authorizing him, if he thought best, "to make the distribution of the cotton in question contemplated by the contract referred to, (between Tweed and Burbridge,) shipping to the cotton agent at New York, to be sold as captured property, the portion received as the Government's share."

It appears (p. 20) that Tweed was first notified of the revocation of the Burbridge contract, at Shreveport, "in March, 1865."

The distribution by Flanders was made (p. 29) under the instructions of the Treasury Department, and, accordingly, he delivered to Tweed three-fourths of it, claiming to hold the other fourth as above, (p. 20.)

Upon the trial Tweed introduced evidence tending to show that the cotton had never been captured or abandoned, nor was it included in any surrender, and never had been the property of the Confederate States, nor destined for their use, but was private property.

Under the *sequestration*, in this case, the cotton was delivered, *pendente lite*, to the plaintiff.

I.

Upon the trial below, at the request of the plaintiff, the court gave the following instruction, which was duly excepted to by the defendant:

> "If the jury believe that the cotton described by the petition was not captured by the army of the United States nor surrendered to them; was not abandoned property, nor was ever property of the Confederate States, but was produced on the plantations of private individuals, and was held and possessed as private property by them until the purchase of the same by the plaintiff; and that he purchased the same on his own account from such private owner, and the same was delivered to him, and that the same was so held until the detention of the same by the defendant, who did not take, hold or possess it under any color of any law or statute of the United States, or any authority of his office or color of the same, but of his own will, the plaintiff is entitled to recover."

For error in such instruction we assign that it takes for granted that Tweed, as agent of the United States, under the Burbridge contract, *could*, with regard to any cotton bought by him at the time and place that most if not all of this was, disclaim being an agent for the United States.

There was *no evidence* that Tweed's agency had been revoked by the first day of March, 1866. The letter authorizing such revocation was written at Washington on the 24th of February before, addressed to an officer at New Orleans, but Tweed first heard of it at Shreveport. The burden of showing when an existing agency terminated, is upon him who avers it, and, therefore, in this case, upon Tweed. All that he can show thereupon is that he first heard of it in March, without further specification. There was no conflict of evidence on this point; and it may be assumed as a fact that Tweed had not heard of the revocation until several days after the 1st of March. It also appears that 463 bales of this parcel of cotton was bought by Tweed on or before March 1st, and all of it by March 8th. (Philipson *vs.* Hayter, Law Rep., 6 C. P., 38.)

Much the larger part of the cotton, therefore, was bought at the time when, and the place where Tweed's agency operated—probably all of it was.

Will public policy allow him to suggest that such cotton was bought as principal, for his own individual advantage?

Tweed shows that the contract extended to only such *Confederate cotton* as was on Red river, and he alleges that this was not of that class.

Before proceeding further, we wish to say that, if it shall appear that any part of this cotton, no matter how small, was purchased by Tweed as agent,—in this suit brought by him under an allegation that none of it was so purchased, the plaintiffs in error are entitled to the benefit of the doctrines in respect to the mingling and confusion by agents of their own, and their principal's goods. The court will observe (Record, p. 24) that 50 bales of this cotton was purchased on the 5th of February. (Story, Ag. S., 205.)

The Burbridge contract was made, as, we submit, appears on its face, at *Tweed's promotion*, and is to be considered upon that theory. It represents, in brief, the existence of large and indefinite quantities of Confederate cotton in private hands on Red river; that the means of identifying it had been destroyed by the holders, for private ends, but that, nevertheless, they, being in fear of its being taken from them by the United States, were willing to take a small price for it; it suggests, as a means of solving the difficulty, that the United States authorize him to purchase it at such small price, and thereupon it is agreed that he do so; and he agrees to use all proper efforts to *purchase as much* of *said cotton* as can be purchased at certain rates mentioned.

We submit that this imposed upon him vigilance, activity, and the duty of having an eye single to the interest of his employer, to such extent that whilst agent he could not place himself in a position to become interested to allay or divert the suspicion of that employer as to any particular parcel of cotton. His *bona fides* in a particular case need not be questioned. The question is whether an allowance of such liberty to an agent may not open a door to fraud in general. Will the relation of principal and agent admit of such liberty?

The case of Keech *vs.* Sandford (2 Eq. Ca. Abridged,

741) is a leading case upon this point. The facts were: That a lease of the profits of a market was devised to a trustee, in trust for an infant; before the term ended, the trustee applied to the lessor for a renewal of the lease for the infant's benefit, which he refused, because he could not distrain, but must rest singly on covenants which the infant could not make; the trustee then took a lease to himself. The chancellor decreed that the lease should be assigned to the infant. He said he must consider it as a trust for the infant, for, if the trustee on refusal to renew might have a lease to himself, few trust estates would be renewed to *cestui que use*, and though it might seem hard that the trustee was the only person of all mankind who might not have the lease, yet it was very proper that the rule should be strictly pursued, and not in the least relaxed, for it was very obvious what would be the consequences of letting trustees have the lease on a refusal to renew to *cestui que trust*.

In Moore *vs.* Moore, (1 Selden, 256,) a mortgagee made his son his agent, to attend the sale of the mortgaged premises, and buy them for him, limiting the agent to $1,500, as the highest price to be bid. The son employed his attorney to act in the case, telling him and others of the limitation, and authorizing him, if the premises went beyond that, to buy them for him. The bidding went beyond $1,500, and the son purchased, through his attorney. He was held to be trustee for his father, because, as the court say, his arrangement with the attorney placed his interest in direct conflict with that of his father.

In Sandford's case above, the transaction was set aside, because, (although an honest one,) to uphold it would have had the general effect of offering a premium to agents to slacken their exertions in behalf of the interests of their principals. The same principle animates Moore's case.

In the case before the court, laying out of view all suggestion of *mala fides* on the part of Tweed, we apprehend a similar result from the upholding of his right to turn around and place the United States at arm's length in regard to any parcel of cotton on Red river. He went there to advance the interests of the United States, and then took a position in which it became his pecuniary interest to circumscribe those interests.

Upon the general subject, we refer the court to Dunlap's Paley's Agency, pp. 32 to 38, and notes; also, Davoue *vs.* Fanning, 2 Johns. C. R., 251, and Michoud *vs.* Girod, 4 How., 503.

II.

At the trial below, the defendant requested the court to instruct the jury as follows:

"If the jury believe, from the evidence, that the defendant, at the time of the institution of this suit, held the cotton described in the plaintiff's petition, in his custody, in the official character and capacity by which he is described in the plaintiff's petition, to wit, as deputy general agent of the Treasury Department of the United States, as captured or abandoned property, or in the administration of, or under color of, either the act of Congress approved March 12, 1863, entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in the insurrectionary districts within the United States,' or the act of Congress approved July 2, 1864, entitled 'An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured property, and the prevention of frauds in the States declared in insurrection;' then, and in that case, the custody of said cotton by the said defendant was custody and possession thereof for the United States, *and said cotton could not lawfully be taken from him by virtue of the writ of sequestration issued in this case, and the jury must find a verdict for the defendant.*"

Of which said instruction the judge refused to give the part in italics, but, in lieu thereof, charged the jury, "that the title to the cotton was still a question which might be examined in the courts of justice, and if the plaintiff had established such a title he could recover under the charge, as first above given."

The defendant also requested the court to instruct the jury as follows:

"If the jury believe, from the evidence, that the defendant at the time the cotton described in the plaintiff's petition was taken from his possession, was in possession thereof or was holding the same as an officer or agent of the United States, administering an act of Congress relating to and providing for the collection of property captured or abandoned during the late insurrection and rebellion, or acting in virtue or under color of such law, then custody of said cotton by the defendant was in law custody thereof by the Government of the United States, and this court was, and is, without jurisdiction or authority to sequester or take the same from such custody, and the execution of the writ of sequestration, issued and executed in this cause, was unlawful and without warrant in law, and the plaintiff is not entitled to recover in this cause or in this court."

As ground of error in its action as regards these requests, we assign that it assumes the propriety of the writ of sequestration issued in this case.

At this point we deny, not that the plaintiff was entitled to recover, but that he was entitled to the particular sort of remedy resorted to, submitting that, during the pendency of an action to recover property against an agent of the United States, such property cannot be taken out of his hands by sequestration; and this, either because such property is in custody of the law, or because the United States, the real defendant, are not liable to have the suggestions made against them, that lie at the foundation of that writ.

In Shropshire *vs.* Russell, 2 La. Ann., 961, the court says "a party who applies for the stringent remedy of sequestration must * * present a case clearly entitling him, under the code and statutes, to that process;" and again, in Barriere *vs.* Feste, 9 La. Ann., 536, "the remedy by sequestration, being a rigorous one, cannot be extended by implication to cases not contemplated by the law maker."

So much in regard to the *exceptional* character of this remedy.

The petition here described the defendant as deputy general agent of the United States Treasury Department, and states, as grounds for applying for sequestration, the petitioner's fears that defendant will, during the pendency of the suit, dispose of, and remove said cotton out of the jurisdiction of this court.

By the act of July 2, 1864, § 8, the Secretary of the Treasury was authorized to appoint agents to transact such business as Tweed undertook by the Burbridge contract. The defendant below was a subordinate officer of the Treasury, authorized to adjudicate upon any cotton that Tweed might have bought under such contract; and the cotton in question, by the orders of the plaintiff, was sent to New Orleans under an open policy of insurance of his official predecessor, and subject to his adjudication.

We submit, therefore, that the custody of such cotton by Flanders was *custody of the law.*

It seems that a thing in the keeping of an officer of the Government, under color of a statute of the United States, upon trust for the benefit of the whole country, is in *custody of the law*, as much as if in the keeping of an officer of the Government, under color of process from a court or magistrate, upon trust for the benefit of one or more citizens.

In Twitty *vs.* Clark, 14 La. Ann., 503, the defendant, as landlord of one Charles, had brought suit for rent arrear, and obtained judgment, with a *privilege* upon the property attached, a part of which was a safe belonging to the plaintiff, but in Charles's possession, with *his* consent. Execution was issued thereupon, and the safe was seized by a constable.

The plaintiff then sued Clark for the safe, and had it sequestered; and the constable intervened.

The court said that the safe, being in Charles's possession, by the owner's consent, was liable to Clark's claim as landlord; and add, (Merrick, C. J.,) "moreover, the proceeding by sequestration was irregular. The constable's authority, when he has property under seizure, cannot be treated in this summary manner, and he cannot be deprived of possession by a writ of sequestration, even by a superior court. The custody of the constable, no less than that of the sheriff, is the custody of the law. If the plaintiff had rights, his remedy is by injunction."

This is the general rule in cases of replevin and of execution against things in the custody of the law.

The cases reported are generally cases of custody under the process of a court, and sometimes the reason assigned is limited to the sort of custody under consideration; but the principle has a wider range, as appears in Willes, p. 136, where distress *damage fesant* is cited as an instance in which protection is due upon that principle. We cite Cromwell *vs.* Owens, 7 Harris & Johnson, 35, and cases there mentioned by counsel; Buck *vs.* Colbath 3 Wallace, 334; (Opinion, p. 341.)

III.

The third instruction asked by the defendant, and refused by the court, was:

> "If the jury believe, from the evidence, that at the time this suit was instituted, and the writ of sequestration was issued and executed in this cause, the defendant held possession of the cotton described in plaintiff's petition and seized under the said writ of sequestration, as an agent or officer of the Treasury Department of the United States for the collection of abandoned and captured property, under the provisions of acts of Congress relating to property abandoned or captured during the late rebellion, then, and in that case, he had full right and authority to hold the same in his possession as such officer or agent, until he was satisfied that

the said cotton was not captured or abandoned property, and that the United States had no claim thereto; and until he voluntarily, or by the direction of the Secretary of the Treasury of the United States, or by the direction of some officer of the Treasury having authority over him, delivered the cotton to the plaintiff, the plaintiff had no lawful right to interfere with defendant's full possession of said cotton, or any part thereof; and, in case he felt aggrieved by the action of the defendant, could only resort to the Court of Claims for relief or redress."

In lieu thereof the judge charged the jury "that if the possession of the defendant was obtained for the purpose of inquiry and adjudication, and that the defendant in good faith prosecuted the inquiry and made the adjudication, that his possession was good for that purpose; but that if he claimed title to hold the same adversely to the title of the plaintiff, and was controlling the same in denial of his right and claim at the time, then the plaintiff might bring his suit, that the courts were open for the decision of such rights."

For error, we assign that the court thereby assumed a jurisdiction that was exclusively in the Court of Claims.

GEO. H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, O. [*January, 1873.*]

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T. D. LINCOLN,

Of Counsel for Defendant in Error.

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I.

STATEMENT OF THE CASE.

This was a suit brought by Tweed, the defendant in error, a citizen of Ohio, against Benjamin F. Flanders, a citizen of New Orleans, on the 21st April, 1866, to recover possession of one hundred and twenty-three bales of cotton unjustly detained by Flanders from said Tweed.

Flanders is described as a citizen of Louisiana, and a deputy general agent of the Treasury Department. He is not sued *as* such agent, but is so described to distinguish him from any other Flanders. It is expressly declared "that no part of said cotton was captured or abandoned property, under any act of Congress, nor by virtue of any military seizure, nor has the government of the United States any right, title, or interest in or to the same, or any part thereof;" that the property was the plaintiff's, and that the said Flanders has possession thereof, and unjustly retains possession thereof, and refuses to deliver the same to him, said Tweed.

He, therefore, reserving his right to sue for damages for such unlawful retention of the said cotton, prays that the said Flanders might be cited, and that the writ of sequestration might isssue, directing the marshal to take possession of the said cotton, until the further order of the Court, and, after due proceedings therefor, that the said one hundred and twenty-three bales of cotton might be decreed to him, or in default thereof, their value. Record, p. 1.

The writ of sequestration was granted (printed record, p. 2), and a motion made to set it aside, which was overruled (printed record, p. 6, 7), and afterward, the same was, by the order of the Court, delivered to the plaintiff, Tweed, upon his giving bond. Record, p. 3.

On the 7th of May, 1866, Flanders filed his exceptions, setting forth :

First. That the property in dispute was captured property, and, at the time of the sequestration, was in possession and custody of the defendant, as legal keeper thereof, for the use of the United States, it having been turned over to the agents of the Treasury Department, by the officers of the army, as Tweed knew, as he was a contractor and *quasi* officer of the government, and with whose knowledge and consent the property was shipped to the defendant.

Second. That the property was *de facto* captured property, and should be dealt with as such, and the proceeds paid into the treasury, there to await the action of the Court of Claims, when duly invoked, and that all other courts of the government are prohibited from taking cognizance of such a case.

Third. That the Circuit Court was without jurisdiction to inquire into the mode of capture, or the question of capture, or of the manner and circumstances of capture, because not a judicial question.

Fourth. That the property being the property of the government of the United States, and in the hands of the proper officer of the Treasury Department, was irreplevi-able, and no order of sequestration could lawfully issue at the suit of said Tweed.

Wherefore the defendant prayed that the writ of sequestration be dismissed. Printed Record, p. 8.

On the same day (May 7, 1866), Flanders filed his answer, reserving to himself his said exceptions, setting forth:

First. He denied the ownership of the cotton in the plaintiff, Tweed, and averred ownership in the United States.

Second. He admitted that as an officer of the United States government, he held possesion of said cotton (a thing not charged, and therefore not the subject of an admission), it having been shipped to him in his official capacity from the agent of the treasury, at Shreveport, under a contract with the plaintiff and the United States Treasury Department, in relation to cotton known as Confederate States cotton, captured in war, and turned over to the Treasury Department, by officers of the United States Army; that, by virtue of said contract and certain services rendered by plaintiffs, three-fourths of the said bales received by the defendant were turned over to plaintiff, and one-fourth was reserved to the United States under adjudication provided for by said contract; that the said one hundred and twenty-three bales was the fourth, and belonged to the United States, and that three hundred and seventy-two bales claimed in another suit were the three-fourths coming to plaintiff under said contract, and it denied that the one hundred and twenty-three bales were in any manner the plaintiff's property, but averred it to be *de facto* and *de jure* captured and abandoned property.

He admitted that his orders were to ship the cotton to New York—another fact not charged.

Wherefore the defendant prayed judgment. Record, p. 9.

And on the 8th of May, 1866, the district attorney of the United States appeared and claimed the cotton as belonging to the United States, and asserted that it was held by said Flanders, as special agent of the Treasury Department of the United States, and that in holding it he was acting as agent and for the benefit of the United States, and therefore he prayed that their claim to the cotton might be allowed and adjudged, and that the proceedings of said Tweed, against the same, be disallowed, with costs and damages. Record, p. 11.

No action was taken on said appearance and petition, nor does it appear to have been in any way allowed, and the case proceeded between Tweed and Flanders, as before.

About nineteen months afterward the defendant, Flanders, by his counsel, filed a peremptory exception against the right of the plaintiff to stand in judgment against him in the said suit, for the reason that he never was the owner of said claim sued upon, but that he owned but two-thirds of the said 123 bales of cotton, the other third belonging to one E. L. Scott. Wherefore he excepted to said suit, and asked that it be dismissed. Record, p. 12.

The case came up for trial and hearing on the pleadings, evidence, and argument of counsel, and the peremptory exception was overruled, and judgment rendered for Tweed. Record, p. 14.

Flanders sued out a writ of error and brought the case to this Court, and the judgment below was reversed at the December term, 1869, and the cause remanded, for the reason that there did not appear in the transcript a stipulation waiving the trial by jury. 9 Wal. 426.

The case having been remanded back, Flanders filed his amended and supplemental answer, February 14, 1871, in which he set up that he was, at all the times named in the petition of said Tweed, a deputy general agent of the Treasury Department, duly authorized, and that the cotton was held by him officially as such agent, in the administration of act of Congress, relating to the states in rebellion, or to persons and property in said insurrectionary states, to wit, the act of March 12, 1863, and the act of July 2, 1864, and other acts relating to said insurrectionary states and to persons and property therein, and in virtue and under color of said acts of Congress, in the exercise of his said office and agency, and that the cotton, when said writ of sequestration issued under said act, was in the due and actual custody, control, and absolute possession of the United States, by reason whereof the same was beyond the lawful reach and effect of said writ of sequestration, and the issuance of said writ was an act of lawless and unjustifiable trespass and violence.

That the holding of the said cotton by the defendant, and his refusal to yield up and deliver possession thereof to the plaintiffs were acts done and omitted by the defendant, not in his private character and capacity, but in the exercise of his office and agency, and in his official character and capacity of agent and officer, done and performed by virtue and under color of and in administration of said act of Congress.

Wherefore he averred that the Court was without jurisdiction of the matters and things complained of, and that the said jurisdiction was in the Court of Claims. Record, pp. 16, 17.

By the practice in Louisiana no replication or rejoinder is known, the answer whenever it sets up new matter being considered as in issue. La. Code of Practice, sec. 329.

The bill of exceptions shows that evidence was offered tending to prove that the plaintiff purchased the cotton in question, being a part of 495 bales of different planters, and paid therefor the fair market price; that it was insured under an open policy of O. H. Burbridge, deputy supervisory special agent of the Treasury Department, at New Orleans, and went to New Orleans, subject to adjudication by O. H. Burbridge.

That the testimony:

"Conduced to show that the cotton was raised in the northern part of Texas, by planters, and was possessed by them until the winter of 1865–66, and was sent to market or to Jefferson, Texas, as private property, and that *it had never been captured by or surrendered to the army or any military authority of the United States, nor included in any surrender; that none of it was the property of the Confederate States, or had been destined for their use, but was private property;* that while said cotton was deposited in the warehouse at Jefferson, Texas, one Turnbull published a notice for claimants of cotton to make oath of their ownership, and failing to do this he would seize it as captured property. He was then an agent to collect abandoned and captured property. One of the parties whose property was seized had no notice of the order, and his property was taken and held by Turnbull, and other property was seized by said Turnbull upon protest of the same kind, and the testimony generally conduced to prove these facts, and that in the opinion of the witness *his seizures were oppressive, causeless, and for the purpose of extortion.*" Record, p. 19.

That:

"In March, 1866, the plaintiff went to Shreveport under a contract" (produced); that "he discovered that there was no property of the kind described in said contract upon which it operated. He was also informed that the contract had been revoked by the Treasury Department. The supervising agent at Shreveport first gave him information to this effect. Thereupon he determined not to take any proceedings under it, and so notified the agent at Shreveport. During the months of February and March, he made purchases of cotton from the owners of the cotton that had been held and seized by Turnbull as aforesaid, and which was then in custody of the agents aforesaid by reason of the seizure. *He was informed that no evidence had been produced to affect the claims of the owners, and the purchases were safe.* The supervising Treasury agent at Shreveport, who held the cotton, so advised the plaintiff."

That neither Turnbull nor Burbridge released the cotton from seizure while they possessed it.

That during the time when these purchases were made, O. H. Burbridge was supervising agent at New Orleans for the district west of the Mississippi; but on the 10th of March, the defendant succeeded to the charge of that business under instructions from the Treasury Department.

"*That on the 23d of March*, 1865, the cotton arrived in New Orleans, and the defendant claimed that the contract aforesaid between the plaintiff and Burbridge was applicable to the same, and that he was entitled, under that contract, to hold a portion of that purchase for the United States, *because the plaintiff, having that contract, could not make purchase of cotton in which the government did not take one-fourth part, although the purchase was not of cotton of the character referred therein. The plaintiff resisted the claim, and insisted upon his title to the whole of the property.*" Record, p. 20.

That the defendant applied to the Treasury Department for instructions; and the instructions and correspondence found in the record were given and had in consequence of the difference aforesaid. That the defendant made a division of the cotton, and delivered the plaintiff's agents three-fourths of the cotton, and claimed to retain the other fourth of the cotton named in the petition, and did retain it. That the plaintiff made a written protest against the partition, and claimed the entire property, and sued out the writ of sequestration, and filed the petition in this cause after protest.

"That the plaintiff read to the jury the proclamations of the President relative to the release of restraints upon internal intercourse in the year 1865; also, the orders of the Secretary of War relieving trade and intercourse from military restraints, and the orders of the commanding general of the Department of Louisiana and Texas promising protection to private property, upon the surrender of the Confederate armies in May, 1865." Printed Record, p. 20.

THE CONTRACT referred to, and attached to the bill of exceptions marked A (but which was not otherwise made part thereof), provided that, whereas it was suggested that large quantities of cotton exist at remote places, in possession of private individuals, which formerly belonged to the late so-called Confederate States, concealed from the agents, and the marks of which were erased to enable the parties holding it to convert it to their own use; that said cotton was remote from military agencies, could not be found or brought forward by the agencies except by increasing the expense of obtaining military aid in removing it; and that parties holding it dare not bring it within the reach of civil or military authorities for fear its true character might be known; and that large quantities of it might be purchased at prices much less than its value, the purchasers taking the risk of seizure by the government. Whereupon it was agreed that Tweed might purchase such cotton at his own risk and expense, and send it forward to New Orleans, and receive three-fourths of the same, giving the government one-fourth, free of all charges, etc.; that the contract was to be submitted to the Secretary of the Treasury for his approval, and might be at any time revoked by him. Printed Record, pp. 23, 24.

This contract was dated January 23, 1866. *It does not appear whether the contract was ever submitted to the Secretary of the Treasury for approval, though it was provided that it should be. But it does appear that afterward, and before these purchases, the Secretary ordered it revoked.* Printed Record, p. 27.

It appears in the record that Secretary McCulloch, on the 2d of April, 1866, approved of the defendant's action in this matter up to that time; but upon what report or information, it does not appear, except that the information came from Flanders by letter (not produced at the trial), and it appears in the letter of approval to have been in some respects incorrect. Printed Record, pp. 29, 30.

It also appears that, at a later time, April 16, 1866, the defendant did not follow the direction of the Secretary in this matter. Record, pp. 30, 31.

The above is a full statement of what it appears that the evidence tended to show, and *all* it tended to show.

CHARGES ASKED.

Four exceptions were taken at the trial, and these exceptions present the only question in the case open for the examination of this Court. They relate to the single charge asked by the plaintiff and given by the Court, and to three charges asked by the defendant and refused.

The CHARGE asked by the plaintiff below was in these words:

> "If the jury believe that the cotton described in the petition was not captured by the army of the United States, nor surrendered to them, was not abandoned property, nor was ever property of the Confederate States, but was produced on plantations of private individuals, and was held and possessed as private property by them until the purchase of the same by the plaintiff; and that he purchased the same on his own account from such private owner, and the same was delivered to him, and that the same was so held until the detention of the same by the defendant, *who did not take, or hold, or possess it under color of any law or statute of the United States, or any authority of his office, or color of the same, but of his own will, the plaintiff is entitled to recover.*" Printed Record, p. 21.

This charge the Court gave, and the defendant excepted thereto. There was evidence tending to show all that is here asked, as the bill of exceptions shows. If it did not so appear, it would be presumed in favor of the judgment below that there was such evidence. This is a well-settled rule.

Russell v. *Ely*, 2 Black, 580.
State v. *Hopkins*, 5 R. I. 58, 59.
Murray v. *Fry*, 6 Ind. 372.
Day v. *Roguet*, 14 Minn. 283.
Miller v. *State*, 2 Kan. 182.

But it does appear. This charge submits to the jury the plaintiff's title, the absence of any and every fact that could give the government agent any right to interfere with it, and the good faith of Flanders in his action in relation to it.

If the jury found the facts submitted in the above charge, the plaintiff's right to recover was clear.

The defendant asked three distinct charges.

The FIRST CHARGE raised the question whether a writ of sequestration would lie, if the defendant held the property as deputy general agent of the Treasury Department, under color of the act of March 12, 1863, or that of July 2, 1864, relating to abandoned or captured property.

The SECOND, presented the question whether, if the cotton was in the defendant's possession at the time the sequestration writ was sued out, as an officer or agent of the United States administering the said acts of Congress or acting under color thereof, whether the Circuit Court of the United States had any jurisdiction of the writ of sequestration to take it from him.

The THIRD, presented the question whether, if the defendant held possession of said property as an agent of the Treasury Department, for the collection of captured or abandoned property under said acts, he had not the right to hold the same until he should voluntarily give it up, and whether the plaintiff had any right to recover the same, except by suit in the Court of Claims. Record, pp. 21, 22, 23.

THESE INSTRUCTIONS, asked by the defendant, presented no question as to the title to the property, how it was acquired and attempted to be held, whether it were in fact captured or abandoned property, whether the United States had any right to it, or any question relating to the merits. I shall hereafter present them *verbatim*, and endeavor to prove that there is nothing in this record which shows that the plaintiff in error was entitled to have either of these charges given.

The jury having found a verdict for the plaintiff, the defendant moved to ARREST THE JUDGMENT for the reasons:

1. That the Court was without jurisdiction.

2. That the defendant was acting as the deputy general agent of the Treasury Department of the United States, administering the several acts of Congress relating to property captured and abandoned during the late insurrection, and acting in virtue of and under color of said several acts of Congress. Printed Record, p. 31.

This motion was overruled. Printed Record, p. 32. A motion for a NEW TRIAL was also made, and the following reasons assigned therefor:

1. That the verdict was against the law and the evidence.

2. That the Court erred in its charge to the jury, and in refusing to charge as asked by the defendant. Printed Record, p. 32.

This motion was overruled. Printed Record, p. 33.

And thereupon the defendant below sued out this writ of error.

II.

THE CIRCUIT COURT DID NOT ERR IN TAKING JURISDICTION.

FIRST. If it be true that the plaintiff below had no right to bring this suit, it is quite clear that he was without legal remedy; and it is equally clear, that a year after all hostilities had ceased in Louisiana, the people there, and their entire property, were subject to the control of these treasury agents, without remedy; and this long after the system relating to non-commercial intercourse and to captured and abandoned property, under which they had acted during the war, had been abolished, and the whole policy of the government in relation thereto had changed. This consequence was apparent to the counsel for the defendant below, and he therefore maintained that there was jurisdiction in the Court of Claims to determine these questions. *It is clear that the Court of Claims had no jurisdiction of this case.* The Court of Claims has no jurisdiction in reference to such a case or to such questions. That Court has no jurisdiction in reference to wrongful seizures or the wrongful withholding of property, or to try the right of property generally. If property has been actually sold as captured or abandoned property, by these agents, and the proceeds of such sale paid into the treasury, then the Court of Claims has, under the 3d section of the act of March 12, 1863, the right to decree the net proceeds to a claimant. 12 Stat. at Large, 820.

And by the act of July 27, 1868, it was declared to have been the true intent and meaning of the act of March 12, 1863, that the suit for the said net proceeds of the property so sold was exclusive of all other suits. 15 Stat. at Large, 243, 244. The result then was, applying this law to the case, that whatever these treasury agents did, in reference to property so seized, no matter upon what motive or for what purpose, though it be for extortion, or how great was the loss—no matter where the sale was made or under what circumstances—to depress the price, (perhaps for the purpose of buying it through some friend or confederate,) the owner could bring no suit except in the Court of Claims, and that simply for the net proceeds. He was compelled to submit to every outrage, and let the cotton be sold and the proceeds paid into the treasury. *And this was to be a complete bar to any and every outrage which might be committed by one of these inferior officers*, so that the latter *claimed* to be acting under color of some one of these laws.

Such a construction of the laws of Congress is inconsistent with any protection under a free government, and with the purpose of these acts, which were largely dictated by a laudable desire to prevent frauds and outrages from being committed upon persons residing in the insurrectionary States. Surely no such construction could be given to this act and then applied to a past transaction. This act of July 27, 1868, must be confined to the cases where the parties have in fact sued in the Court of Claims for the proceeds, if held valid.

Second. Now, there is nothing in the case tending to show a state of facts that could raise the question presented by the charges asked. The evidence tended to prove that the property was not captured or abandoned property, had never been surrendered to the army or any portion thereof; was never owned by the Confederate States government, but was wrongfully seized by a subordinate Treasury agent from the planters who had raised it and owned it, and for purposes of extortion. Printed Record, pp. 19, 20.

And there is nowhere in the record *any evidence showing or tending to show that the property came under the description of property liable to seizure under any of these laws, but the evidence tended to show the contrary. The bill of exceptions shows:*

> "*That even the defendant testified that he had no evidence at all to affect it as captured or abandoned property at the time this suit was brought.*" Record, p. 19.

Now, while in *favor* of the judgment of the Court below, everything will be presumed that is not concluded by the record, yet as *against* it nothing is presumed; but the party alleging error must make it appear upon the record. This rule is equally well established. The rule is quite strict here, and has been illustrated by some very remarkable cases.

> *White* v. *Brough*, 1 Rolle, 286.
> *United States Express Co.* v. *Bachman*, 2 Cin. Sup. Ct. R. 256.
> *Cathcart* v. *Commonwealth*, 37 Penn. St. 111.
> *Miner* v. *Phillips*, 42 Ill. 129, 130.

It was not on the ground assumed in the charges that the defendant below claimed to hold the cotton. It was upon the *ground that Tweed had no right to purchase it, except under the contract entered into between him and Burbridge, January* 23, 1866, and that under that contract the United States was entitled to the cotton.

Tweed claimed that the cotton did not fall under the terms of that contract, and that the same had been revoked by the Secretary of the Treasury before he purchased any of the cotton. Printed Record, p. 20. And the evidence reported tended to show this state of fact claimed by Tweed. Printed Record, pp. 20, 27.

Now, if this contract had been revoked, and if the cotton was not of the character set out in the contract and was not purchased under it, *what warrant had the Secretary of the Treasury to interfere with it, or to order his subordinate agents so to do? And what right had the defendant to hold it? And how, pray, could the Court of Claims take jurisdiction of and try these questions?* And if the Court of Claims had no authority to settle such a controversy between the plaintiff and the defendant, was Tweed without remedy? Could he not appeal to the Circuit Court of the United States? Indeed, the act of July 27, 1868, presupposes that the Circuit Court has in fact jurisdiction. So does the act of July 28, 1866, and the act of March 3, 1863. Indeed, the act of March 2, 1833, expressly gives such jurisdiction, and it furthermore, in the revenue cases, places the property seized in the possession of the law, subject to the orders and decrees of the courts of the United States.

And is not property in the possession of the law always subject to sequestration, attachment, or replevin by order of a court having jurisdiction?

The second, third, and fourth sections of this act of March 2, 1833, were extended over the acts of March 12, 1863, and of July 2, 1864, in question, which was intended to give the Circuit Court jurisdiction in cases like this, where, on account of the character of the parties, it had it not before. But of this more further on.

THIRD. WHAT IS ABANDONED AND CAPTURED PROPERTY, AND WHAT COULD BE PURCHASED.

The act of March 12, 1863, did not give any definition of abandoned or captured property. But on the 3d of July, 1863, Mr. Secretary CHASE, in a CIRCULAR LETTER, addressed to Supervising Special Agent Mellen, and published for the use, of such special agents, thus describes this kind of property:

> "ABANDONED PROPERTY is of two descriptions: *First.* That which has been deserted by the owners; and, *Second.* That which has been voluntarily abandoned by them to the civil or military authorities of the United States." P. 58.

This circular is found printed by the Government printing office, in a small book entitled, "ACTS OF CONGRESS and RULES AND REGULATIONS prescribed by the SECRETARY OF THE TREASURY in pursuance thereto, with the approval of the PRESIDENT," to which I shall refer.

But a distinct definition was given of abandoned property in the act of July 2, 1864, in these words:

> "All property, real or personal, described in the acts to which this is an addition, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion." 13 Stat. at Large, 376.

This definition somewhat restricted the first branch of the definition previously given by the Secretary of the Treasury, in requiring that the owner should not only be absent from the property, but should be "engaged, either in arms or otherwise, in aiding or encouraging the rebellion." This definition is twice given in the same language in the act of July 2, 1864, sections 2 and 3, at the end of each section.

Captured property was thus described in the said circular:

> "CAPTURED PROPERTY is understood to be that which has been seized or taken from hostile possessors by the military or naval forces of the United States, and is to be turned over, with certain exceptions named, to the special agents of this department, under the act of March 12, 1863." Acts of Congress and Rules and Regulations, etc., p. 58.

No definition is given of captured property in the act of July 2, 1864.

But on the 30th of July, 1864, the Secretary of the Treasury, by the approval of the President, made certain regulations, and which are printed with the acts aforesaid (p. 111), and these various species of property are thus described:

> "III. ABANDONED PROPERTY, is that which has been or may be deserted by the owners, or when the lawful owners thereof shall be voluntarily absent therefrom and engaged either in arms or otherwise, in aiding or encouraging the rebellion.
>
> "CAPTURED PROPERTY, is that which has been or may be seized or taken from hostile possession by the military or naval forces of the United States.
>
> "CONFISCABLE PROPERTY, is that which is liable to confiscation under the act of July 17, 1862."

Now, it is clear that in the latter part of February and March, 1866, when Tweed purchased the property in question, property to be abandoned, so as to authorize these Treasury agents to receive it, must be deserted by the owner, or he must be engaged in arms or otherwise aiding or encouraging the rebellion. It was only such property that those agents were authorized to take possession of as abandoned property.

And as to captured property, they were simply to receive it from the military and naval forces that had captured it. They had no power or authority to capture it, but they were to receive it from the military and naval forces that had captured it from hostile possession, and relieve them from the care of it, sell it, and pay the proceeds into the Treasury.

The very nature of these laws clearly shows this.

These special agents had no authority to issue general Rescripts or Proclamations to the country in February or March, 1866, or at any time before, requiring planters who had gathered their cotton to a place of shipment, to come in and prove their title or they should take possession of it as captured property—such as Turnbull issued, and claimed to act upon. Such conduct was in violation of the system under which he was acting. Record, p. 19.

Sad enough would have been the condition of things there, if in addition to the frauds and oppression which were feared from individual soldiers and marines, and subordinate officers of the Treasury Department, and which these acts endeavored to avoid, if these subordinate agents were to assume such IMPERIAL POWERS.

There was no authority for any such thing under any of these acts.

Now, there is nothing in the record tending to show or prove that the defendant below had any right to the possession of this property as against Tweed, upon the ground that it was property falling under these acts of Congress, and which should give the Court of Claims jurisdiction over it. This will more clearly appear as we proceed further, and therefore the Circuit Court could not give these charges,

III.

THE AGREEMENT WITH TWEED WAS NOT VALID, AND COULD GIVE NO TITLE UNDER THE CIRCUMSTANCES.

The cotton in question was not claimed by Flanders as having been captured or abandoned, or as having been cotton belonging to the Confederate States, as has been stated, but as belonging to the United States under the agreement of January 23, 1866, marked A, and found on pp. 23 and 24 of the printed record.

This agreement was not valid, and though Tweed was not likely to know this fact when he entered into it, Burbridge should have known it, he being a supervising agent.

First. It does not fall under the 8th section of the act of July 2, 1864—the only law authorizing purchases by the government. That provided for the purchase of cotton, to be paid for out of the proceeds of abandoned and captured property, and the whole of which should be shipped for sale and belong to the United States, and be paid for out of this fund. 13 Stat. at Large, 377.

Second. It did not authorize the purchase of cotton forfeited, and belonging to the United States.

On the contrary, the rules and regulations then in force, made by the Secretary of the Treasury, under the sanction of the President, directly forbid such purchase. By the 8th section of the act the authority to purchase cotton was to be conferred by *the Secretary* upon the approval of the President, and the places where such cotton was to be purchased were to be designated by the Secretary. 13 Stat. at Large, 377. The Secretary had no authority to make or authorize any other purchase.

This agreement has none of the elements required by that section. It does not appear to have been authorized, and was, indeed, forbidden by the rules and regulations. There were no special instructions from the Secretary such as the rules require.

The following were regulations made by the Secretary of the Treasury, under date of April 25, 1865, and approved by the President:

> "III All agents are prohibited from purchasing products of insurrectionary states which have been captured by the military or naval forces of the United States, or which shall have been abandoned by the lawful owner.
>
> "IV. No purchase or sale of products shall be made, except in compliance *with special instructions of the Secretary of the Treasury*, to the agent making the same." Rules and Regulations, p. 145.

This forbid any such contract as that with Tweed, and Tweed in these purchases did not act under it, or contrary to these rules.

On the 22d of July, 1865, the Secretary of the Treasury issued a CIRCULAR to supervising and assistant special agents, in which he states:

> "It has come to the knowledge of this department that large contracts have been made by some of the agents, with various persons, for the collection of abandoned and captured or surrendered cotton; authority being generally, or in many instances, given to the contractors to discover and collect all such cotton within a certain district.
>
> "While such contracts have been to some extent contemplated or authorized by previous regulations" (this, I think, is a mistake), "*such action now is not in conformity*

with the spirit or intention of the executive proclamation relating to the subject; and if any contracts of that character have been made by you, operations under them should be suspended and closed up at once." Rules and Regulations, p. 148.

This CIRCULAR proceeds:

"Contracts with reputable and responsible persons, on reasonable and proper terms, for the collection, putting in order, and transporting to points accessible for shipment, by rail or water, of *certain specified lots of cotton known to the agent, the locality, quantity, and description of which, should be fully and accurately stated in each case; but in view of the manifest evils likely to result from such steps, no arrangement will be sanctioned which contemplates the scouring of any given portions of the country* for property of the character herein referred to, by persons who are not bonded officers of this department.

"As stated above, any existing contract heretofore made by you, not in conformity with the spirit of these instructions, *must be at once modified or closed up, and your future action shaped accordingly.*" Rules and Regulations, p. 148.

Now this CIRCULAR forbid any such contract as that made with Tweed, for that gave no description of the quantity or quality of the cotton; did not relate to particular lots, and was unlimited as to territory.

While it appears that, on April 2, 1866, the Secretary of the Treasury was aware of the *general* character and object of Tweed's contracts, yet it appears that he was not aware of its details; that no copy of it had been forwarded to the department. Record, p. 30. And while the contract itself provided that it was to be approved by the Secretary, and was liable at any time to be avoided by him, it nowhere appears that it was so approved, and it expressly appears that it was annulled before Tweed purchased any of the cotton in question. Record, pp. 20, 28. So that the agreement in question could give the defendant no right to take possession and hold this cotton, as belonging to the United States.

CHARGE No. 3, as given (page), relieved the defendant from any damage which was caused by his holding said cotton, for the purpose of inquiring as to its nature and character, and only held him responsible where his holding was not for such purpose, but upon a claim of title adverse to Tweed. Record, pp. 22, 23.

In this connection it will be borne in mind that all RESTRICTIONS UPON COMMERCIAL INTERCOURSE, AND ALL RESTRAINTS OF TRADE west of the Mississippi, had been done away with by the proclamation of the President, and the circular of the Secretary of the Treasury.

The Secretary of the Treasury, in his circular letter of June 27, 1865, says:

> "ALL RESTRICTIONS ON COMMERCIAL INTERCOURSE, in and with states, and parts of states, heretofore declared in insurrection, and on the purchase, transportation, and sale of products thereof, are removed." Rules and Regulations, p. 137.

In the same circular is the following:

> "3. Agents for the purchase of products of insurrectionary states, on government account, will close their official business, east of the Mississippi, with the transaction of the 13th instant; and west of it with the transaction of the 24th instant: *returning to sellers all property or money received or collected since these dates respectively*, and using such dispatch in the premises that their connection with the department may, if possible, terminate with the 31st instant. Rules and Regulations, p. 137.

"4. Officers of this department, charged with the duty of receiving and collecting, or having in their possession or under their control, CAPTURED, ABANDONED, OR CONFISCABLE PERSONAL PROPERTY, ... *will refrain from receiving such from military or naval* authorities, after the 30th instant. This will not be construed, however, as interfering with the operations of agents *now* engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records, etc., delivered to the United States military authorities, by rebel military officers or cotton agents." RULES AND REGULATIONS, pp. 137, 138.

The word *now* is made emphatic in this circular.

And from this time on, June 27, 1865, it is clear that there was nothing to prevent Tweed from purchasing this cotton on his own account, and that any such agreement as that made with Burbridge, and under which Flanders claimed the title to this cotton, was inconsistent with the RULES AND REGULATIONS then in force relating to the subject; and even if this agreement had not been revoked, and if the cotton had been purchased under it, it would give Flanders no authority to hold this property further than for inquiry. It would not authorize him to claim and hold it adverse to Tweed, much less exclude all inquiry by the Circuit Court of the United States into the question of title, or whether Flanders was, in good faith, acting under color of the laws inquestion; and, therefore, these charges could not have been given.

IV.

THE LAWS IN QUESTION WERE OF A TEMPORARY CHARACTER, AND NOT AT THE TIME APPLICABLE TO THIS CASE.

The act of March 12, 1863, and that of July 2, 1864, were laws originating in and having relation to war. They were dictated, as has been stated, largely by a friendly feeling toward the non-combatant people of the South, who might be driven from their property or who might be willing to put it into the possession of the government, for sale, during the conflict of arms; and for such persons the government, as it had no power to protect them generally, was to receive and sell it for such owners as could show their loyalty.

And the system of Treasury agents was inaugurated to relieve the military and marine from the care of such property as they might capture—free them from the temptation relating to it, and that they might devote their attention to the enemy.

They were laws highly proper for a state of civil war then in existence, but wholly out of place when the war was over and the efforts of the government were for peace and conciliation.

And therefore, in May and June, after the armies of the Confederate States had surrendered upon the promise of protection and security to property, the government at once abandoned the whole system of COMMERCIAL and TREASURY AGENTS which had been inaugurated for the purpose aforesaid, and who at the time in question had no power as such, and could not seize or hold property belonging to citizens *as such government agents.* Turnbull's acts, as shown by this record, were a gross outrage upon the people and upon the spirit of the laws in question, and upon the system of Treasury regulations; and Flanders could gain no aid in his controversy with Tweed on account thereof. He received under the charge of Court, as reported, more protection than he was entitled to—far more than has been accorded to other government agents acting under circumstances of more doubt and difficulty.

V.

FLANDERS WAS NOT ACTING UNDER COLOR OF THESE LAWS.

But it is said that Flanders was acting under color of these laws, and is therefore protected by the act of July 27, 1868. This act was passed long after the transactions in question, and long after the sequestration in this suit.

Now, that section evidently relates to property that has been sold and the proceeds paid into the Treasury, as a careful consideration of all the laws upon this point will show; and it provides that it was the intention of the act of March 12, 1863, that the remedy granted by the third section of that act was exclusive, precluding the owner of any property taken by agents of the Treasury Department, as *abandoned or captured property,* in virtue or under color of said act, from suit at common law or any mode of redress whatever before any court or tribunal other than the

Court of Claims, and it then provides that in all cases in which persons may be sued for and on account of property taken by such person as an officer or agent of the United States, in virtue or under color of the act of March 12, 1863, or that of July 2, 1864, that the defendant might, in bar thereof, plead that such act was done or omitted as an officer or agent of the United States in the administration of one of said acts of Congress, or in virtue or under color thereof, and that such plea, *if the fact be sustained by proof*, shall be a complete bar, etc.; and that the judgment recovered in such a case shall not be paid by the United States unless the amount received by the defendant as the proceeds of the transaction which was the foundation of the suit, be paid into the Treasury, except upon an appropriation duly made therefor, after the full examination of the claim upon its merits. 13 Stat. at Large, 244.

Now, there are several things to be noted as to this act, as bearing upon this case:

FIRST. The first part of the section, as to what was the true intent and meaning of the act of March 12, 1863, was purely a legal question, over which Congress had no control.

The United States v. *Klein*, 13 Wal. 148.
De Chastellaux v. *Fairchild*, 15 Penn. St. 20.
Merrill v. *Sherburn*, 1 N. Hamp. 203, 204.
Sandborn v. *Com. af Rice Co.*, 9 Minn. 279.
Lewis v. *Webb*, 3 Greenl. 333.
Holden v. *Jones*, 11 Mass. 402.

SECOND. This section evidently contemplates a suit against an agent who has received property as abandoned or captured, *and has sold it and paid the money into the*

Treasury, or who has possession of the same, and it was for the protection of such an officer *thus situated.*

Now, Flanders did not claim to hold this property as captured or abandoned. He claimed to hold it under the agreement with Tweed, and Tweed denied that it fell under the agreement; *first*, because the cotton was not of the nature or character of the cotton described by the agreement; and, *second*, because the agreement was vacated by the Secretary of the Treasury before the cotton was purchased, and he did not act under it.

This act, therefore, does not apply to the case, and can not create a defense for that which had happened more than two years before.

THIRD. The suit was not one in which a personal judgment was sought against Flanders. It was a suit for the possession of the cotton; and it was, by order of the Court below, delivered to the plaintiff Tweed long before the act in question was passed, and long before the act of July 27, 1866, was passed. Printed Record, p. 2.

As Flanders was not a revenue officer, there was no act which made this property irrepleviable, until the act last aforesaid was passed; and even then it could be replevied by the permission of a court of competent jurisdiction, as can all property in possession of the law. Section 2 of the act of March, 1833, made applicable to the case in question, expressly so provides. And this property before that time had, by order of the Court, passed into Tweed's possession, and the purpose of the suit, so far as he was concerned, was accomplished. It was only, by the subsequent resistance of Saunders, in claiming title adverse to Tweed, that any further litigation or expense arose, as the property was not captured or abandoned, and as no personal judgment was sought against Flanders in this suit for damages, it is not one to which the act applied.

FOURTH. *Flanders could not at the time act by virtue, or under color of the act of March* 12, 1863, *or that of July* 2, 1864.

All restrictions upon commercial intercourse had been done away with for more than six months; the business of special agents for the collection of captured and abandoned property had ceased, and purchasing agents had been ordered to close up their business by the 30th of the previous June. Tweed's contract had been held to be unauthorized, and had been vacated. Actual hostilities having ceased in Louisiana and Texas by the surrender of the armies of the Confederate States, there was no longer any reason for the application of the acts in question, and the Treasury Department had therefore put an end to its system of Treasury agents inaugurated under these laws, and no Treasury agent had any longer any right to act under or by virtue of these laws.

How, then, could it be said that Flanders acted by virtue of, or under color of, these laws? Whether he did, or not, was the question which the record shows was tried. Printed Record, pp. 21, 22.

A man can not act by virtue of, or under color of a law, unless that law authorizes him to do the act in question.

Reynolds v. *Orris*, 7 Cow. 272.
Britten v. *Butler*, 9 Blatch. C. C.

A man is acting under color of title when he has a deed which purports to grant the property, and he has entered in good faith under such deed. The deed must purport to convey the land.

Granger v. *Swart*, Walw. C. C. 91.
Graham v. *Bayne*, 18 How. 62.

An officer is acting under color of his office when he has some right to it, and is in possession, and acting as such officer.

In such cases, as to *third persons*, the act of such officer is not void because there may have been some irregularity in his investiture of his office.

Keyser v. *McKissan*, 2 Rawle, 140.
Riddle v. *County of Bedford*, 7 Serg. & R. 392.
The People v. *Collins*, 7 Johns. 554.
The People v. *Hopson*, 1 Denio, 579, 580.
Taylor v. *Skinner* 2 Comst. S. C. 696.
McInstry v. *Tanner*, 9 Johns. 135.
Plymouth v. *Painter*, 17 Conn. 593.

But even in this case, the officer must not be a mere intruder, without color of title, without honest claim of title, derived from an election or appointment.

Rex. v. *Lisle*, 2 Strange, 1090.
Keyser v. *McKissan*, 2 Rawle, 140.
The People v. *White*, 24 Wend. 526.
The People v. *Collins*, 7 Johns. 554.
Cocke v. *Halsey*, 16 Pet. 85, 86.
Brown v. *Lunt*, 37 Maine, 429.
Carleton v. *The People*, 10 Mich. 258.
Plymouth v. *Painter*, 17 Conn. 593.
Tucker v. *Aikin*, 7 N. Hamp. 132, 133.

In a case where the officer himself is a party, he must be the rightful officer, and his acting under color of office will be no protection.

The People v. *White*, 24 Wend. 526.
Keyser v. *McKissan*, 2 Rawle, 140.
The People v. *Hopson*, 1 Denio, 579.
Green v. *Burke*, 23 Wend. 503.
Plymouth v. *Painter* 17 Conn. 593.
Tucker v. *Aikin*, 7 N. H. 133.
Riddle v. *County of Bed.*, 7 Serg. & R. 392.
The People v. *Cotton*, 7 Johns. 554.
Venable v. *Curd*, 2 Head 586.
Pierce v. *Hawkins*, 2 Swanst. 89.

And it would seem to require no authority to show that an officer can not act by virtue of or under color of a law, unlesss the law authorized him to do the thing he did.

Reynolds v. *Orris*, 7 Cow. 272.
Bigelow v. *Stearns*, 19 Johns. 40.
The King v. *Com. of Bedford Level*, 6 East, 369.
Britton v. *Butler* 9 Bl. C. C. 461.

The grounds, upon which the rule of law upon this subject rests, is well presented in the case of *Plymouth* v. *Painter*, 17 Conn, 592, 593. After referring to many cases upon the subject, the Court say:

"The principle established by these cases, in regard to the proceedings of officers *de facto* acting under color of title, is one founded in policy and convenience; is most salutary in its operations; and is indeed necessary for the protection of the rights of individuals and the security of the public peace. The rights of no person claiming a title or interest, under or through the proceedings of officers having an apparent authority to act, would be safe, if he were obliged to examine the legality of the title of such entered in good faith under such deed. The deed must purport to convey the land.

Granger v. *Swart*, Walw. C. C. 91.
Graham v. *Bayne*, 18 How. 62.

An officer is acting under color of his office when he has some right to it, and is in possession, and acting as such officer.

In such cases, as to *third persons*, the act of such officer is not void because there may have been some irregularity in his investiture of his office.

Keyser v. *McKissan*, 2 Rawle, 140.
Riddle v. *County of Bedford*, 7 Serg. & R. 392.
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> "The principle established by these cases, in regard to the proceedings of officers *de facto* acting under color of title, is one founded in policy and convenience; is most salutary in its operations; and is indeed necessary for the protection of the rights of individuals and the security of the public peace. The rights of no person claiming a title or interest, under or through the proceedings of officers having an apparent authority to act, would be safe, if he were obliged to examine the legality of the title of such

officer up to its original source, and the title or interest of such person were held to be invalidated by some accidental defect or flaw in the appointment, election, or qualification of such officer, or in the rights of those from whom his appointment or election emanated; nor could the supremacy of the laws be maintained, or their execution enforced, if the acts of officers, having a colorable but not legal title, were to be deemed invalid. . . . .

"The acts of a mere usurper of an office, without any colorable title, *are undoubtedly wholly void, both as to individuals and the public.* But where there is color of lawful title, the doings of an officer, *as it respects third persons and the public,* must be respected until he is ousted on *quo warranto,* which is the appropriate proceeding to try the validity of a title to an office, and in which it would be necessary for him to show a complete title in all respects. *Although in a suit against a person for acts which he would have authority to do only as an officer, he must, in order to make out a justification, show that he is an officer de jure;* because the title to the office being directly drawn in question in a suit to which he is party, may be regularly decided; so where he sues for fees, *or sets up a title to property by virtue of his office, he must show himself to be officer de jure.*" 17 Conn. 592, 593.

It is equally clear that whenever a person, who is sued, sets up that he was an officer acting under color of law, it devolves on him to show that the law at the time authorized the thing which he is endeavoring to defend; that he was, or supposed he was, invested with power to act by the law, and that he was *in good faith* so acting.

Reynolds v. *Orris,* 7 Cow. 272, 273.
The King v. *Com. of Bed. Level,* 6 East, 369.
Britton v. *Butler,* 9 Bl. C. C. 461.
Bigelow v. *Stearns,* 19 Johns. 42.

Now, there was no law at the time which permitted Flanders to detain the property upon a claim of title to the same in the United States.

1. He was not special agent, appointed under the first section of the act of March 12, 1863, to collect all abandoned or captured property, and had not given the bond required as such special agent by the *third* section of the said act. It was only such agents that were to receive abandoned or captured property under said laws.

Flanders does not appear to have been such. He was at the time deputy general agent of the Treasury Department. He was not sued as such, but such he was. He was not a *special* agent appointed under said acts, and therefore could not claim to act under them. Nor was he acting as an agent authorized, under the 8th section of the act of July 2, 1864, to purchase property. That section evidently refers to the special agent appointed under the *first* section of the act of March 12, 1863. The second section of the act of July 2, 1864, refers to these same agents (13 Stat. Large, 375), and it is of them that the act speaks.

Flanders was not, therefore, one of the officers authorized to act under these laws, and could not defend as acting by virtue of or under color of the same.

2. Burbridge had not been specially authorized by the Secretary of the Treasury, with the approval of the President, to purchase property in the insurrectionary States. And no special lots, within a defined territory, had been ordered to be purchased, as provided by the rules and regulations in existence on the 23d of January, 1866, when the contract with Tweed was made; and Burbridge had no authority to make the contract. (See pp. 21, 22, of this brief.) Flanders being an officer, acting under the rules and regulations, was bound to know what they provided, and the laws under which he claimed to be acting. And as these not only did not authorize this contract, but, in fact,

forbid it, he can not claim protection upon the ground that he was acting by virtue of or under color of these laws.

3. The law of March 12, 1863, and that of July 2, 1864, were of a temporary character. As has been stated, they were enacted for the time of active hostilities. This is evident from the various provisions of these laws. Their object was two-fold:

First. It was to take care of and preserve for loyal people in the South, who were compelled to abandon their property by the events of the war, or who, to preserve it from destruction, were willing voluntarily to turn it over to the United States, to be sold under these laws.

Second. It was to relieve the military from the care of the property they might take, and to free them from the temptation connected with its capture.

That these were the purposes of the laws, and that they were temporary and related to a condition of war, and indeed to a time of active hostilities, is evident from all their provisions. And their execution depended upon RULES AND REGULATIONS to be made by the Secretary of the Treasury, with the approval of the President. Sec. 11 of the act of July 2, 1864, 13 Stat. at Large, 378. Such rules and regulations were made from time to time during the war, but after the surrender of the armies of the Confederate States they were abolished, with the whole system of regulations relating to commercial intercourse, and relating to abandoned and captured property, as inconsistent with the then condition of things and with the policy of the government. See the *Circular of Secretary McCulloch of June* 27, 1865, *before quoted from*, pp. 21, 22, of this brief.

What authority, then, had any of these agents of the Treasury Department, special or general, to do anything by virtue of or under color of these laws? What authority had Flanders, with or without the order of the Secretary of the Treasury, to retain this property from the legal owner? What authority had Turnbull to act as he did? Neither the Secretary of the Treasury nor any of his special agents had any authority whatsoever, at any time, in relation to captured property, but to receive it—they could not be supposed to *capture it;* and such property was directly described in the CIRCULAR of Mr. Secretary CHASE of July 3, 1863, and in the RULES AND REGULATIONS of Mr. Secretary FESSENDEN, made with direct reference to the acts of Congress of March 12, 1863, and of July 2, 1864, as

> "Property which has been or may be seized or taken from hostile possession by the military or naval forces of the United States." See pp. — of this brief.

This shows that Turnbull had no authority to take the property. As there was no evidence at the trial tending to show that the property was ever abandoned or captured, or property belonging to the Confederate States, nor was ever surrendered to the army or any military authority of the United States (the record, indeed, clearly showing the contrary, Printed Record, p. 19), the Circuit Court might have gone much farther than they did, by directly refusing the charges asked by the defense. The charges submitted the question to the jury, whether the defendant did or did not take hold or possess the property under color of any law of the United States, or any authority of his office, or under color of the same, rather than of his own will. See charge asked by the plaintiff. Record p. 21; this brief, p. —. Such general instructions as to what constituted acting under color of these laws as were not objected to, we must presume to have been given by the Court, over and above the charge asked by the plaintiff. It is a familiar rule relative to the bill of exceptions and what it tends to prove, that it will be construed most strongly against the party taking it, and that all fair presumptions will be made to sustain the judgment below.

Russell v. *Ely*, 2 Black, 580
Firemens' Insurance Co. v. *Crandall*, 33 Ala. 16.
Smith v. *Garrett*, 31 Ala. 493.
Duffee v. *Pennington*, 5 Ala. 508.
Patten v. *Heyter*, 15 Ala. 23.

CHARGES ASKED BY PLAINTIFF IN ERROR.

With reference to these rules let us more particularly examine the charges asked by the plaintiff in error. Charge 1 is in these words:

"1. If the jury believe, from the evidence, that the defendant, at the time of the institution of the suit, held the cotton described in the plaintiff's petition in his custody in the official character and capacity by which he is described in the plaintiff's petition, to wit, as deputy general agent of the Treasury Department of the United States, as captured or abandoned property, or in the administration of or under color of either the acts of Congress, approved March 12, 1863, entitled 'an act to provide for the collection of abandoned property and for the prevention of frauds in the insurrectionary districts within the United States,' or the act of Congress, approved July 2, 1864, entitled 'an act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary states, and to provide for the collection of captured property and the prevention of frauds in states declared in insurrection,' then and in that case the custody of the said cotton by said defendant, was custody and possession thereof for the United States (and said cotton could not lawfully be taken from him by virtue of the writ of sequestration issued in this case, and the jury must find a verdict for the defendant)." Record, pp. 21, 22.

This charge the Court refused to give as asked, but gave it by striking out the last sentence in ( ), and inserting in lieu of the part so stricken out, this:

> "That the title to the cotton was still a question which might be examined in the courts of justice; and if the plaintiff had established such title, he could recover under the charge as first above given."

To which refusal to charge as asked and giving the charge as modified, the defendant excepted. This qualification refers to the charge above, as asked by the defendant in error (p. 10 of this brief), which presented the question of the good faith of Flanders in the detention of the property in question.

Now this charge as asked could not be given for several reasons:

1. It does not purport to set out how Flanders *held* the cotton in said capacity. He may have seized it from malice or ill will so far as this charge is concerned. He may have held it without any real color of right as to its falling under any provision of the laws named. Simply because he professes so to hold it, is not enough.

Flanders never pretended that the cotton was captured or abandoned, or in any way forfeited as the cotton of the Confederate States government. He testified at the trial that at the time it was sequestered he had no evidence to affect it as captured or abandoned property. Record, p. 19. Turnbull's acts gave no right; they were an outrage upon the people, and Flanders claimed nothing on account thereof. His distinct claim was that he held it under the agreement of January 23, 1866, for the reason that Tweed could not buy unless under that agreement. Record, 20. The Court therefore might to have refused this charge unconditionally, instead of giving it, except that as to the jurisdiction of the Court.

The party asking a charge must be entitled to it as a whole, or it may be refused generally.

2. The record shows no evidence tending to prove that the property was so held by the defendant; the record showed directly the contrary. The cotton was not received by him till the 23d of March, 1866.

And at the time the cotton was sequestered (April 21, 1866), by the order of the Court, there was no law making it irrepleviable, even if it had been abandoned or captured property.

The 8th section of the act of July 28, 1866 (14 Stat. at Large, 329), extended the 2d, 3d, and 4th sections of the act of March 2, 1833 (4 Stat. at Large, 633), and the 12th section of the act of March 3, 1863 (12 Stat.'at Large, 741), to all cases arising or which may have arisen, and to all suits pending against any officer or other person by reason of any act under authority or color of the acts of March 12, 1863, and July 2, 1864, and provided that any judgment obtained against such officer or person should be paid from the funds obtained from leased lands and from the proceeds of captured and abandoned property.

The 2d section of the act of March 2, 1833, thus extended to officers acting under the captured and abandoned property laws, though it provides *generally* that the property derived by the revenue officers shall be irrepleviable, nevertheless provides that it

> "Shall be deemed to be in custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." 4 Stat. at Large, 633.

As property in the possession of the law is always repleviable, upon the order of the Court having competent jurisdiction, the clause above, making it irrepleviable, must be held to apply to a replevin taken at the option of the party suing it out.

By the laws of many of the states, property is replevied without any order of the court, and this clause was to meet such cases. But the act in question expressly provided for a replevin under the order of a court having competent jurisdiction. As the one hundred and twenty-three bales of cotton in this case were sequestered by order of the Circuit Court (Record, p. 2), it comes directly within the provision above named.

This charge, No. 1, could not have been given, even if this law of March 2, 1833, had applied to the case at the time the sequestration was permitted.

The 3d section of the act of July 27, 1868, has no such provision, but evidently presupposes that a replevin might be taken out.

3. Neither of the laws of March 12, 1863, nor July 2, 1864, authorized any Treasury agent to take or hold any property which was not abandoned or captured. The evidence in this case tended to show that the property in question was neither captured nor abandoned.

The special Treasury agents, appointed under the acts of March 12, 1863, and July 2, 1864, were authorized to collect and receive abandoned and captured property.

They were authorized to do nothing more; and whenever such agent went beyond that, he was outside the purview of these laws, and can not claim their protection.

The SECOND CHARGE, asked by the defendant, was in these words:

> "2. If the jury believe, from the evidence, that the defendant, at the time the cotton described in the plaintiff's petition, was taken from his possession, was in possession thereof, or was holding the same as an officer or agent of the United States, administering an act of Congress relating to and providing for the collection of property captured or abandoned during the late insurrection and rebellion, or acting in virtue or under color of such law, then custody of the said cotton by the defendant was in law custody thereof by the government of the United States, and this Court was and is without jurisdiction or authority to sequester or take the same from such custody, and the execution of the writ of sequestration issued and executed in this cause was unlawful and without warrant in law, and the plaintiff is not entitled to recover the same in this cause or in this Court."

This charge was refused, and exception taken to such refusal. Printed Record, p. 22.

This charge presented the same question as was presented by No. 1, and also the question of the jurisdiction of the Court of Claims.

This charge could not be given unless the Circuit Court was without any jurisdiction in the case, which we have shown not to be true. And the same considerations before expressed, in reference to charge No. 1, apply to this charge.

Simply because Flanders was, at the time the cotton was taken possession of, an officer or agent of the United States, administering the laws relating to captured and abandoned property, and he was in possession as such, *or*, was acting under color of such laws, is not enough to place the cotton in the custody of the United States—much less to oust the Circuit Court of all jurisdiction in relation thereto. The defendant must show: 1. That the laws and the regulations under which he professed to act, authorized *him* to seize and hold *this* cotton; and, 2. That in so doing he was acting in good faith. He was himself sued for wrongful acts, and what is set out in the above charge, construed, as it must be, most strongly against him, was not sufficient to constitute a defense. Suppose, being such officer, he got possession for the purpose of extortion, without any fair claim of right, would the charge then be true?

As neither the whole evidence, nor all the evidence tended to prove is in the record, nor any of the general charge, the charge asked should present a case which fairly excludes the above idea where wrongful acts are charged, otherwise the presumption in favor of the judgment below must prevail.

The State v. *Hopkins*, 5 R. I. 59.
Russell v. *Ely*, 2 Black, 580.
Henry v. *Norse*, 54 Maine, 259.
Murray v. *Fry*, 6 Ind. 373.

And the 12th section of the act of March 3, 1863, has direct reference to suits to be brought against the collectors and other officers of the revenue, for any act done by them, or for the recovery of any money exacted by or paid to such officer, and by him paid into the treasury of the United States, in performance of his official duty, and provides for the employment and payment of counsel in such case, *and for the payment of the judgment obtained against him* out of moneys appropriated; for stay of execution, etc., wherever the judge certifies that there was probable cause for the act done by the collector or other officer, or *that he acted under the direction of* the Secretary of the Treasury, or other proper officer of the government. 12 Stat. at Large, 741.

This section is extended to the acts in question by the 8th section of the act of July 28, 1866, which also provides for the payment of the judgment rendered against such officer, from the funds obtained from leased lands and from captured and abandoned property, under the laws in question.

As the *first* section of the act of July 27, 1868 (15 Stat. at Large, 243), refers to and extends the 8th section of the said act of July 28, 1866 (which extends the 2d, 3d, and 4th sections of the act of March 2, 1833, to the acts in question), and the 12th section of the act of March 3, 1863 (which relates to defending and paying judgments obtained against revenue officers), to the captured and abandoned acts in question, it is clear, I think, that the third section of the act of July 27, 1868, was only intended to enable the special agents of the Treasury Department to plead in bar that they acted by virtue of and under color of the laws in question, *when* the party suing had proceeded in the Court of Claims for the proceeds of the cotton sold and paid into the Treasury.

The THIRD CHARGE asked by the defendant below was in these words:

> "3. If the jury believe, from the evidence, that at the time this suit was instituted, and the writ of sequestration was issued and executed in this cause, the defendant held possession of the cotton described in plaintiff's petition and seized under said writ of sequestration, as agent or officer of the Treasury Department of the United States for the collection of abandoned and captured prop-

erty, under the provisions of acts of Congress relating to property abandoned or captured during the late rebellion, then, and in that case, he had full right and authority to hold the same in his possession as such officer or agent until he was satisfied that said cotton was not captured or abandoned property, and that the United States had no claim thereto; and he voluntarily, or by direction of the Secretary of the Treasury of the United States, or by direction of some officer of the Treasury having authority over him, delivered the cotton to the plaintiff, the plaintiff had no lawful right to interfere with defendant's full possession of said cotton or any part thereof; and in case he felt aggrieved by the action of the defendant, could only resort to the Court of Claims for relief or redress." Printed Record, p. 22.

This charge the Court refused as asked, but in lieu thereof the Court charge the jury:

"That if the possession of the defendant was obtained for the purpose of inquiry and adjudication, and that the defendant in good faith prosecuted the inquiry and made the adjudication, that his possession was good for that purpose, but that if he claimed title to hold the same adversely to the title of the plaintiff, and was controlling the same in denial of his right and claim at the time, then the plaintiff might bring his suit; that the courts were open for the decision of such rights." Printed Record, p. 23.

To the refusal to charge as requested and to the charge as given, counsel for the defendant excepted.

This charge, as the others, might have been refused absolutely, for the reason, among others, that the defendant himself testified that, at the time the writ of sequestration was sued out, *he had no evidence at all to affect it as captured or abandoned property*. Record, p. 19. And the bill of exceptions clearly shows that it was not such.

Here, also, is this same error about the jurisdiction of the Court of Claims. This charge might have been refused generally, but the Court gave it with a qualification such as the case required, and which presented the defense in as favorable a light as possible under the circumstances.

As to these charges asked, we say generally, 1. That each one of them embraces something that the defendant was not entitled to. They are too broad. And 2. That the bill of exceptions, when construed with reference to the legal principles and presumptions applicable thereto, does not set out evidence enough, or sufficiently set forth what the evidence tended to show, to raise the questions presented.

VI.

OTHER REASONS WHY THE JUDGMENT SHOULD NOT BE REVERSED.

Until provision was made to the contrary, officers of the revenue who had acted in good faith in the collection of the duties, and even under the direct instructions of the Secretary of the Treasury, were liable to answer for illegal duties collected and paid into the Treasury. They acted in relation thereto at their peril.

McLane v. *The United States*, 6 Pet. 426.
Elliott v. *Swartout*, 10 Pet. 137.
Hall v. *Warren*, 2 McLean, 340.
Bend v. *Hoyt*, 13 Pet. 267.

And even officers of the army in time of war, though acting in good faith, were liable personally for the taking of property, and were put upon their defense.

Mitchell v. *Harmony*, 13 How. 134.
Britton v. *Butler*, 9 Bl. C. C. 465.

Until statutory provision was made to the contrary, revenue officers were liable to individuals for illegal acts to their injury, for the reasons that the government could not be sued, and that otherwise such persons would be at the mercy of these officers; and to this day there is no law that provides that because a revenue officer *claims* to act by virtue of or under color of the revenue laws, or where he seizes property in administering such laws, he is protected from suit by an individual injured by his acts; and therefore, because Flanders *claimed* so to act, it is no defense, nor does it deprive the Circuit Court of jurisdiction in the matter. The law of July 27, 1868, will not be so construed as to protect officers from acts of outrage upon private property, where another fair construction can be given to it, nor to relate back and make a party liable for an act or upon a contract, when, by the law, at the time of such act or contract, he was not so liable.

Now, the sequestration in this case had taken place, by the order of the Court, more than two years before the passage of this act, and more than three months before the passage of the 8th section of the act of July 28, 1866. Tweed had received and sold the property, and the controversy, therefore, in the case, was, to know whether he was liable on the bond given upon sequestration. If he was not so liable as the law stood when it was executed, if he could not be made so liable by the law as it then stood, could he be made liable thereon by the act of July 28, 1866, or by the act of July 27, 1868? The property being neither captured nor abandoned property, and the United States having no right to it under the agreement of January 23, 1866, made with Burbridge, Tweed having purchased it, and paid full value for it, and the same having been delivered to him, and the Circuit Court having permitted him to sequester it upon giving bond, and there being then no law that could make him liable upon the bond, for the reason that the property was his, how can a law passed subsequently make him liable thereon?

To what end should this Court *now* reverse the judgment in the Circuit Court? Does this record show that the property belonged to the United States? Is there anything in the bill of exceptions presenting *that* question? The charges asked do not raise it. Nothing in those charges touch the title or real right to the property. The property has gone to the party who had paid full value for it—who owned it, and had a right to it.

No personal judgment was asked in this suit against Flanders. The suit was one to obtain possession of this property, and the costs and expenses have been made since the property was delivered to him.

If the judgment below was reversed, is judgment to go against Tweed upon the bond? If so, is Flanders to have the amount thereof, or is it to go into the Treasury? If the latter, *by what law does it get there?* It was not captured or abandoned property. There is no evidence on record showing it, or tending to show it. The evidence shows directly the contrary. It was not purchased under the agreement. There is not a decent pretense set out in the bill of exceptions that it was; *and by what law is it to be paid into the Treasury?* If paid in, it is said Tweed can turn round and sue the United States in the Court of Claims, and get it out, upon the terms provided in the 3d section of the act of July 27, 1868. If that is to be the result, is it just, and will the Court reverse?

So far as the record shows, the United States was not entitled to the property under the agreement. The agreement had been vacated before the purchase, and the purchase was not made under it. *By what right or title, then, could Flanders or the United States recover its value on the bond?*

There can be no reversal upon any ground that the United States had any right to the property, for there is no such question fairly raised in the record. It will be carefully noted that the charges asked do not touch it; and there is nothing in the record by which the question could be raised, even in this Court.

For what purpose or object, therefore, shall there be a reversal?

Nothing connected with the merits is found in this record, and the reason is that there were none to be presented. The agreement having been vacated, and the property not being of the character described therein or purchased thereunder, and the property being neither captured nor abandoned, and Turnbull's connection therewith being a mere outrage upon the owners, done at a time when he had no power whatsoever to act, not claimed in the defense to be valid, it was clear that there were no merits either in this suit or in that immediately preceding it; and there was no attempt, therefore, to present any; but an effort was made to get rid of the cases in another way—by technical rules. And the question is, whether the defendant has shown in the record that these rules will avail him. The fact is, Flanders had just come into his position, and he felt it necessary to show his power. His "little authority" might be "brief," and he therefore began at once; and in his eagerness to show his power, committed wrongs against the defendant in error for which the law gave him this remedy.

VII.

THE ACTION OF THE SECRETARY OF THE TREASURY CREATES NO DEFENSE.

The fact that the Secretary of the Treasury approved or even authorized the acts done by Flanders, can not aid him in this defense. He had no authority to order Tweed's property to be wrongfully detained. Such an order has frequently been held to be no defense in similar cases.

Lenning v. *Maxwell,* 3 Bl. C. C. 126.
Munson v. *Maxwell,* 3 Bl. C. C. 365.
Britton v. *Butler,* 9 Bl. C. C. 465.

The only effect that this fact could have would be to authorize the Secretary of the Treasury to employ counsel to defend Flanders and to have the judgment paid from the fund relating to leased lands and abandoned and captured property, by virtue of the 12th section of the act of March 3, 1863 (12 Stat. at Large, 741), as amended by the 8th section of the act of July 28, 1866 (14 Stat. at Large, 329, 330), which last section is referred to and adopted in the first section of the act of July 27, 1868 (15 Stat. at Large, 243).

But I take it that these provisions imply that there shall be good faith in the conduct of the officer, and some color of right to act—at least some law providing for action in such a case.

The approval of the Secretary of the Treasury in such a case is obtained, necessarily, almost exclusively upon the statements and representations of the officer to him, as it appears they were in this case, so far as his action was approved. And it is a noticeable fact, that the letter of Flanders to the Secretary of the Treasury, of February 22, upon which he acted, is not presented. Record, pp. 29, 30. What it contained we do not know, and as the evidence in relation to these matters is not before the Court, we can not suppose that Flanders has fared hardly in this suit.

If he has acted with reasonable discretion and in good faith under the direction of the Secretary of the Treasury, he will be protected under the 12th section of the act of March 3, 1863. But whether he is or not, it is no reason why Tweed should bear the loss, which his indiscreet, rash acts (to say the least of them) have brought upon him.

All of which is respectfully submitted.

T. D. LINCOLN,
Of Counsel for Defendant in Error.

Robert Clarke & Co., Printers, 65 West Fourth St., Cin., O. [*Feb.*, 1873.]

Supreme Court of United States,

DECEMBER TERM, 1872.

United States, Intervenors, etc.

136.] *v.*

John P. Tweed.

T. D. LINCOLN,

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United States, Intervenors, etc.

136.] *v.*

John P. Tweed.

I have, on this 12th day of February, 1873, first seen the brief filed by the Attorney-General and the Solicitor-General, in this case; and desire to make a short reply thereto. I had previously printed a brief in the case, which is herewith presented, in which I have said nearly all I desire to say in the case. The late rules relating to briefs, give so short a time between the filing of the brief of the plaintiff in error and that for defendants in error, that for counsel not residing in Washington and representing the latter, there is no opportunity to examine the brief of the plaintiff in error, and make any reply thereto. At least it is not safe, under these rules, for the defendant in error to wait to see the brief of the plaintiff in error before printing their brief. I therefore printed the brief herewith presented, in advance of seeing the brief of the plaintiffs in error.

In this brief I shall only answer some few of the positions taken in the brief of the learned counsel, and that but in part, and refer the Court to the brief heretofore printed.

I.

TWEED WAS NOT AN AGENT TO PURCHASE COTTON FOR THE UNITED SATES.

FIRST—In the brief of the learned counsel it is claimed that Tweed was an agent to purchase cotton for the United States, under the act of July 2, 1864. This, I think, is an assumption not authorized by anything in the record.

The Secretary of the Treasury had no authority to authorize purchases of cotton for the government, except under the 8th section of the said act.

That section provided:

> "It shall be lawful for *the Secretary of the Treasury, with the approval of the President*, to authorize agents to purchase for the United States any products of states declared in insurrection, *at such places therein as shall be designated by him*, at such prices as shall be agreed on with the seller, not exceeding the market value thereof at the place of delivery, nor exceeding three-fourths of the market value thereof in the city of New York, at the latest quotations known to the agent purchasing: *Provided*, that no part of the purchase money for any products so purchased should be paid, or agreed to be paid, *out of any other fund than that arising out of the property sold as captured or abandoned property, or purchased or sold under the provisions of this act.*" 13 Stat. at Large, 377.

Now, Tweed was never appointed an agent of the government to purchase cotton, by the Secretary of the Treasury, by and with the approval of the President. He was not, in fact, so appointed by any one; and there is no claim in this record that he was, or that he was not, or that he considered himself, the agent for the government in purchasing cotton for and on account of the government. The contract entered into between Burbridge and Tweed, does not in any of its particulars conform to the provisions of this statute. The contract makes Tweed precisely what he considered himself to be—a *contractor* with the government, and not its agent; for he was in no way qualified as an agent of the government, and his contract is not in accordance with the plan provided for by that section.

This all appears still more clearly by a reference to the rules established for the purchase of cotton, drawn up by Mr. Secretary Fessenden and approved by Mr. Lincoln, on the 24th of September, 1864.

The first three of these rules are as follows:

> I. "Agents shall be appointed *by the Secretary of the Treasury, with the approval of the President*, to purchase for the United States, products of States declared to be in insurrection, *at places hereinafter designated, or that may, from time to time, be designated as markets or places of purchase.*"
>
> II. "The following places are designated as such markets, or places of purchase, to wit: *New Orleans*, Memphis, Nashville, Norfolk, Beaufort, N. C., Port Royal, and Pensacola."
>
> III. "Before entering upon the discharge of their duty, each of the agents so appointed shall execute a bond, with sureties in the prescribed form, in a penal sum to be fixed by the Secretary of the Treasury, conditioned for the faithful discharge of his duty, and that he shall not engage directly or indirectly in the purchase of products on private account, nor be in any way interested in the products purchased by him, or the proceeds or profits arising therefrom." Rules and Regulations, p. 139.

It is evident that the contract is not in accordance with these rules, and does not appoint or make Tweed an agent of the government, or anything more than a contractor with Burbridge. The rules did not authorize any roving commission or agency by means of contracts of purchase. This is also shown by the circular of July 22, 1865, quoted from in my former brief, pp. 21, 22.

The contract is in direct defiance of this rule. It is not probable that Tweed knew it; but Burbridge should have known it—and it is quite clear, from this as well as other sources, that the Secretary of the Treasury could not have approved of a contract so at variance with the regulations established with the approval of the President, under the 11th section of the act in question, and which were binding upon him. Tweed was a merchant, not a government agent, and did not so regard himself. He considered himself as a contractor simply.

That the Secretary only knew of this contract generally, is shown in the record, p. 30.

The whole system of rules relating to the purchasing of cotton by agents, under the 8th section of the act of July, 1864, shows that Tweed was not such agent, and that his contract was not to make him such agent, and that he had no authority to purchase and bind the United States or the captured and abandoned fund under the said act.

The contract was made under a misapprehension of the statute and of Burbridge's powers; and it was one, as has been shown in the former brief, that was neither authorized by the statute, nor by the regulations of the Secretary of the Treasury, made with the approval of the President.

It is not perhaps very important to show that under the rules for the purchase of cotton, Tweed's contract was not authorized, and that he was never created an agent to purchase for the United States thereby; for the reason that all purchases of the kind were forbidden long before the contract was made. This I have shown in the former brief. See pp. 21 and 22, where the matter is considered. He had a clear right to purchase without contract or permission from the Treasury Department.

SECOND.—It is said in the brief of the plaintiffs in error, that this contract of Tweed was "at *Tweed's promotion*, and must be considered upon that theory." Brief, p. 8.

What difference this fact will make, if true, is not very distinctly pointed out, but the fact, is not shown in this record. There is nothing in the contract that shows it. It was just as likely to have been Burbridge as Tweed. Who it was that represented the facts therein stated does not appear. It may as well have been some third persons, or the agents of the government, that so represented, as Tweed. This record is to be construed most strongly against the plaintiff in error; and nothing, not shown in the record, is to be presumed against the judgment of the Court below; and I insist that there is nothing in the agreement, or anywhere in the record, that shows that this contract was more by the "promotion" of Tweed than of Burbridge.

The regulations made by the Secretary, Mr. Fessenden, under the 11th section of the act of July 2, 1864, by the approval of Mr. Lincoln, were, on the 25th of March, 1865, amended by the Secretary, McCulloch, and again on the 9th of May, which were approved by President Johnson; and these were the last regulations upon the subject. By these regulations the contract in question was not legal *as a contract with the government*, for no purchase could he made, except with the special instruction of the Secretary of the Treasury to that effect. *See former brief, pp.* 21, 22. *See Rules and Regulations, pp.* 139–141, 145–147.

These regulations require the purchasing agent to give bond, etc.

All these regulations, however, for the purchase of cotton, were, on the 22d of July, 1865, declared to be "not in conformity with the spirit or intention of the executive proclamation relating to the subject;" and the special agents were required, that if any contracts of the kind had been made by them, they should be suspended and closed up at once. *See the Circular of that date to the Supervising and Assistant Special Agents—Rules and Regulations, p.* 148. *Former Brief, pp.* 21, 22.

This put an end to any contracts for purchase; and certainly after this, Mr. Secretary McCulloch could not have approved of any such contract as a contract with the government. And the record would seem to indicate that he had not approved of it. See Record, p. 30.

THIRD.—Nor is the contract with Tweed one authorized by the rules for the collection of captured and abandoned property.

First. In the first place it does not relate to captured or abandoned property, but to what was known as Confederate States' cotton.

Second. In the second place it was not in accordance with the rules provided for on the 29th of July, 1864.

The *tenth* of the rules had this provision:

> "When property is liable to be lost or destroyed in consequence of its location being unknown to the special agents, or from other causes, and parties propose, for compensation, to collect and deliver it into the hands of such agents at points designated by them, supervising special agents may contract on behalf of the United States, for the collection and delivery to them of such property, which percentage must be full compensation for all expenses of whatever character, incurred in collecting, preparing and delivering such property at the points designated. Prior to any such contract being made, the party proposing

must submit, in writing, a statement of *the kind and amount of property proposed to be collected*; the locality where to be obtained; and all the facts and circumstances connected with it, particularly as to its ownership. And any contract made in pursuance of this regulation must be in *writing, and restricted* to the collection and delivery of *particular lots at named localities*; or when circumstances clearly justify it, to the general collection and delivery of all abandoned property in *limited* districts, not greater in any case than *one parish or county*, and not more than one district to be assigned to one contractor."

This is, substantially, the 12th Rule, adopted January 26, 1864, by Mr. Secretary Chase. This rule was continued by the rules of August 18, 1865. See first regulation of that series—*Rules and Regulations*, p. 149.

The contract with Tweed does not follow any of these provisions; and Burbridge had no right to make it. The seventh of these last-named rules will more fully show this; for it there appears that the sending out parties upon such general contracts was not anticipated or provided for, but that the rules were intended to have the purchases made by bonded agents, and of the planters or owners of specified lots of cotton, and at designated places. See *Rules and Regulations*, p. 150.

The contract with Tweed, therefore, was not authorized, either by the law, or by the Rules and Regulations. The parties were mistaken as to the condition of the law on the subject.

1. It was not authorized by the eighth section of the act of July 2, 1864; and it did not make him an agent to purchase, and was inconsistent with the law and with the rules and regulations made thereunder.

2. It did not appoint him as an agent to collect captured and abandoned property, and was inconsistent with the rules and regulations under which such cotton was gathered; nor did it purport to relate to captured and abandoned property. There is nothing to show that Tweed regarded himself as an agent of the Government.

3. Nothing can be gained in this suit from said agreement,

for the reason that there was no evidence in the case tending even, to show that the property in question was captured or abandoned, or Confederate States cotton; but the record shows the contrary.

4. And the record shows that the contract was never approved by the Secretary of the Treasury, and was declared terminated before the cotton in question was purchased.

5. The whole system of collecting captured and abandoned property had been done away with, prior to the purchase of this cotton; and neither Burbridge, Flanders, nor the Secretary had any right or power in relation to it.

FOURTH.—It is also said on page 7 of this brief, that 463 bales of this cotton were purchased on or before the 1st of March, and all of it before the 8th. *Where does this appear?*

This, I think, is an error. This record presents some confusion upon this subject; for, whereas, Tweed purchased but 495 bales of cotton, there are 540 referred to on pp. 24, 25, and 26 of the record. Twelve of these were purchased on the 8th of March—Record p. 24; 65 on the 5th of March—Record p. 25; 23 on the 26th of February—Record p. 52; 386 bales on the 1st of March, and 4 bales on the 24th of February—Record p. 26; and 50 bales seems to have been purchased on the 5th of February, by Charles Goodwin. Now, how this 495 which this record shows that Tweed purchased were made up, does not distinctly appear in this record. When Goodwin transferred this cotton to Tweed, does not appear.

That he purchased it as Tweed's agent, does not appear—and on p. 25 of the record (*Record pp.* 27, 28), it appears that Goodwin transferred the cotton he bought to Tweed—when, it does not appear. All that appears in that is, that in February and March he purchased the cotton.

On the 23d of February, 1866, the Secretary of the Treasury wrote to Flanders, that he should, as soon as possible, terminate all contracts; and Tweed's contract (if it ever had any binding force between him and the government, which I deny), might have been terminated; and he had notice of it before he purchased any of this cotton. (p. 7).

All the confusion in this record is for the plaintiff in error to explain. It is not our bill of exceptions, and we are not complaining of the judgment.

What we insist upon is this—that the record has no evidence showing, or tending to show, that any of this cotton was purchased under this contract, or before the Secretary of the Treasury ordered that all contracts for the collection of captured and abandoned property, be at once discontinued or declared at an end.

Fifth.—The learned counsel in their brief, say, on p. 8, that Tweed shows that the contract extended only to such Confederate cotton as was on Red river.

There is nothing in the record upon this point, except what is found in the contract itself; and this, in terms, relates to cotton "on or near the Red river and its tributaries," which is a much greater district than was allowed by the Rule X of the Regulations before quoted from; for that limits all contracts to one parish or county.

"On and near the Red river and its tributaries" embraces a pretty extensive region of country.

II.

THE PROPERTY WAS SUBJECT TO THE WRIT OF SEQUESTRATION, IN THIS CASE.

It is next maintained, not that the plaintiff below was not entitled to the cotton, but that he could not get it by the writ of sequestration. (Brief p. 12.)

First. It is said, first, that the property was in possession of the law, and could not, therefore, be sequestered. But the writ of sequestration in this case was expressly allowed by the Court having jurisdiction of the parties and of the matter in controversy, upon bond executed (Record p. 2); and property in *custodia legis* can always be attached, executed upon, replevied or sequestered by the direct order of a court having jurisdiction in the matter.

Second. But how was this property in *custodia legis?* Flanders was not a judicial officer, nor was he in possession of it by virtue of any writ or process from a court commanding him to seize or hold the property, nor by any law or order relating to this particular property. Nor was there, at the time the sequestration was ordered, any law placing the cotton in *custodia legis.*

Flanders had no right to it except as an agent under the captured and abandoned laws; and as an agent to collect such cotton thereunder they did not authorize him or any other agent of the Treasury Department to seize or hold any property that was not captured or abandoned property, and there was no evidence tending to show that this was such—indeed the evidence directly showed the contrary—and Flanders, as a witness in the case, swore that he had no evidence to affect the property as captured and abandoned property. (Record p. 19.) These Treasury agents were mere ministerial officers; and the fact that they *claim* to hold this property under the agreement of Tweed, with Burbridge, surely did not place it beyond the power of the Circuit Court of the United States, unless there was some express law to that effect.

Property seized by the revenue officers was not in the custody of the law or in the custody of the United States, until there was a direct statute to that effect.

The act of March 2, 1799 (1 Stat. at Large, 648 to 670) and the act of March 2, 1832, (4. Stat. at Large, 633), so provided as to revenue matters; but it at the same time provided that the property should be subject to the orders of a court of competent jurisdiction. Parties whose property is seized by such mere ministerial officers, would be in a sad condition if there were no court who could permit them to take the property upon giving a sufficient bond for the protection of the Government.

On July 28, 1866, this very law of March 2, 1833, was extended over this matter of captured property; and by its provisions the property could be replevied by permission of the court having competent jurisdiction thereof. 14. Stat. at Large, 329. This was the first time that this kind of property was placed in *custodia legis*, and the Statute of March 2, 1833, was adopted for the reason that that very act provided that it should be subject to the orders of the Court; and though a replevin could not be had of it upon the mere motion of the party (as was the practice in many States), yet it could be by the order or permission of the court, as was done in this case.

Third. Again, the possession of the government was denied under this contract. It was denied that the cotton was of the description provided for therein, or was purchased thereunder. Was the simple *claim* of the government officers, one of these